STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 13, 2006
v	No. 259462 Wayne Circuit Court
PARIS ROMAN-ALFONSO LINDSAY, Defendant-Appellant.	LC No. 04-005350-02

Before: Whitbeck C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316; possession of a firearm during the commission of a felony, MCL 750.227b; and solicitation of first-degree premeditated murder, MCL 750.157. The trial court sentenced defendant to concurrent terms of life imprisonment for his first-degree murder and solicitation convictions, and a consecutive two-year sentence for his felony-firearm conviction. Because the record supports the finding that defendant voluntarily gave statements to police, sufficient evidence supports his convictions, he was not denied the effective assistance of counsel at trial, and alleged prosecutorial misconduct did not deny defendant his right to a fair trial, we affirm.

The charges against defendant arose following the fatal shooting of Alvin Foy. The police responded to the crime scene in southwest Detroit at about 12:20 a.m. on May 4, 2004. After interviewing codefendant Quinton Paschal,[1] Detroit police officers obtained and executed a search warrant on defendant's residence. Police arrested defendant during the execution of the search warrant. Defendant, who suffers from sickle cell anemia, was treated in the emergency room for pain related to his condition on May 5, and he was again taken to the hospital on May 6, 2004, following his arrest. He was treated and released, but he was subsequently admitted to Detroit Receiving Hospital on May 7, 2004, for further treatment. Defendant made incriminating statements to police following his release from the hospital on May 6, 2004, and while hospitalized on May 7, 2004. At trial, the prosecutor's theory of the case was that defendant

[1] Just before trial, Paschal entered into a plea agreement wherein he pled guilty to second-degree murder, MCL 750.317, and felony-firearm, MCL 750.227b.

solicited Paschal to kill Foy and that defendant aided and abetted in committing Foy's murder by providing aid and encouragement to Paschal.

Defendant asserts that the trial court erred when it denied his motion to suppress his May 6, 2004, statement to Sergeant Ernest Wilson and his May 7, 2004, statement to Detective Sergeant Lil Drew. He claims that the statements were involuntary and were the product of police coercion. On appeal from a ruling on a motion to suppress evidence of a confession, we review the record de novo but give deference to the trial court's findings and do not disturb those findings unless they are clearly erroneous. *People v Kowalski*, 230 Mich App 464, 471-472; 584 NW2d 613 (1998). A finding is clearly erroneous if the finding leaves this Court with a definite and firm conviction that a mistake was made. *People v Hall*, 249 Mich App 262, 267-268; 643 NW2d 253 (2002). Deference is given to the trial court's assessment of the weight of the evidence and the credibility of the witnesses. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

A statement of an accused made during a custodial interrogation is inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Before the trial court may admit a challenged confession as evidence, the prosecutor must establish by a preponderance of the evidence that the defendant waived his *Miranda* rights. *People v Daoud*, 462 Mich 621, 632-634; 614 NW2d 152 (2000). Whether a waiver of *Miranda* rights was voluntary and whether an otherwise voluntary waiver was knowingly and intelligently given are separate prongs of a two-part test for a valid waiver of *Miranda* rights. *Id*. at 635-639. "Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that the court must determine under the totality of the circumstances." *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000).

Defendant asserts in particular that he did not voluntarily waive his *Miranda* rights and make the statements of his own free will because he was in great pain due to his sickle cell anemia, and was heavily medicated for pain. Defendant testified that Sergeant Wilson and Detective Sergeant Drew forced him to write out answers that they dictated to him and that the medical staff at the hospital was "in cahoots" with the police department. Defendant also testified that Sergeant Wilson threatened to withhold further medical treatment from him until he gave a statement, and that Drew promised that he would be free to leave the hospital after he gave a statement. Defendant also claims that his physician's *Walker*[2] hearing testimony proved conclusive on the issue of the voluntariness of his confession. He claims that his physician testified that defendant's pain would have prevented him from waiving his *Miranda* rights.

Our review of the record reveals that defendant's physician generally indicated that a medicated person under the stress of a murder interrogation could have difficulty concentrating which might affect his or her ability to understand *Miranda* warnings. But the physician did not opine that defendant actually experienced these effects. To the contrary, the physician testified that defendant was "quite tolerant" of pain medications and would not have experienced the

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

difficulty concentrating or disinhibitive effects from his medications to a degree that would render him unable to communicate or understand his actions.

Both Sergeant Wilson and Detective Sergeant Drew testified that they personally evaluated defendant's physical and mental capabilities and opined that he was capable of participating in the interviews. Detective Sergeant Drew testified that he inquired about defendant's condition, and personnel at the nurse's station told him that defendant was "okay to be interviewed." Both officers also testified that defendant did not appear to be under the influence of any intoxicants. Detective Sergeant Drew also stated that defendant never complained, and he appeared to understand his questions. Detective Sergeant Drew noted that defendant was able to walk to a restroom and return to his hospital bed on his own.

Both officers additionally provided a thorough explanation of the procedure employed to inform defendant of his rights and to ensure that defendant would understand the rights he was waiving and would acknowledge the accuracy of his answers. Defendant read his rights aloud and initialed each right. He also reviewed the questions asked and his answers for accuracy. And, he signed the bottom of each page and was given the opportunity to cross out parts of the statement by placing his initials next to those areas. These procedural safeguards support the finding that defendant effectuated a knowing, intelligent, and voluntary waiver of his rights. It is clear from the record that defendant's sickle cell anemia caused him to suffer from pain episodes, which required greater treatment and medication than his normal chronic pain required. However, the evidence indicated that defendant was able to tolerate large doses of pain medication and had a continued ability to communicate while on the medication. The trial court properly ruled that defendant voluntarily waived his *Miranda* rights and voluntarily gave his statements to the police in spite of his illness.

Defendant argues that there was insufficient evidence of premeditation to sustain his solicitation of murder and first-degree premeditated murder convictions. When reviewing a sufficiency of the evidence claim, we review the record de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). We review the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). We will not interfere with the jury's role of determining the weight and credibility of witnesses, and we draw all reasonable inferences and resolve credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant essentially argues that, absent his involuntary and coerced confessions, the prosecutor could not establish the premeditation necessary to convict defendant. Because the trial court properly admitted defendant's statements to police, we necessarily consider those statements when considering the sufficiency of the evidence. Solicitation of murder consists of (1) the solicitor purposely seeking to have someone killed and (2) trying to engage someone to do the killing. *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002). In this case, the prosecution presented circumstantial evidence independent of defendant's confession that defendant solicited Paschal to kill Foy. It demonstrated that the once-close relationship between defendant and Foy had declined to the point where they no longer associated. Defendant's former girlfriend testified that defendant told her that he wanted Foy dead. She stated that defendant had planned Foy's death for quite some time because he believed that Foy was behind robberies that occurred at his house. In a letter to defendant, she indicated her belief that

defendant's medication rendered him physically unable to kill Foy. And, she saw defendant and Paschal together the weekend before Foy's death with defendant's .45 caliber gun. The bullets and shell casings recovered from Foy's body and the crime scene were from a .45 caliber weapon.

Once the prosecution presents direct or circumstantial evidence independent of the defendant's confession that the specific injury or loss occurred and that some criminal agency was the source or cause of the injury, "(a) defendant's confession then may be used to elevate the crime to one of a higher degree or to establish aggravating circumstances." *People v Ish*, 252 Mich App 115, 116-117; 652 NW2d 257 (2002) (citations omitted). Defendant confessed that he paid Paschal to kill Foy. In his statement to police, defendant admitted that he asked Paschal to kill Foy for him on the day of Foy's murder and that he paid Paschal $400 to do so. Further, defendant stated that Paschal killed Foy, and defendant admitted that he gave Paschal a .45 caliber weapon to use for the murder. Defendant also made "it clear to Q [Paschal] if he was to kill Alvin, not to bring the gun back to my house." The evidence presented was sufficient to establish that defendant committed the crime of solicitation of murder.

There was also sufficient evidence to justify defendant's first-degree murder conviction on an aiding and abetting theory. Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of those crimes as an aider and abettor. *People v Coomer*, 245 Mich App 206, 223; 627 NW2d 612 (2001). To prove aiding and abetting of a crime, a prosecutor must show: (1) that the crime charged was committed by the defendant or some other person; (2) that the defendant performed acts or gave encouragement which assisted in the commission of the crime; and (3) that the defendant intended the commission of the crime or had knowledge of the other's intent at the time he gave the aid or encouragement. *People v Moore*, 470 Mich 56, 67; 679 NW2d 41 (2004).

To prove first-degree murder, the prosecutor must show that the defendant killed the victim, and that the killing was willful, deliberate, and premeditated. MCL 750.316(1)(a); *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). Premeditation means to think about the act beforehand, and deliberate means to measure and evaluate the major facets of a choice. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). "Although there is no specific time requirement, sufficient time must have elapsed to allow the defendant to take a 'second look.'" *Id*. Factors that may be considered to prove premeditation include (1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the homicide, including the choice of weapon and the location of the wounds inflicted. *Id.* Thus, to prove that defendant was an aider and abettor to the crime, the prosecutor was required to show that, at the time of the killing, he either had the premeditated and deliberate intent to kill the victim or that he participated in the crime knowing that the principal possessed this specific intent. *People v Youngblood*, 165 Mich App 381, 387; 418 NW2d 472 (1988). An aider and abettor's state of mind may be inferred from all the facts and circumstances. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the execution of the crime, and evidence of flight after the crime. *Id*.

There was sufficient evidence to support defendant's first-degree murder conviction on an aiding and abetting theory. Foy was found dead with gunshot wounds to his head in Detroit at

12:20 a.m. on May 4, 2004. The cause of Foy's death was homicide, and the bullets and shell casings used to kill Foy came from a .45 caliber weapon. Foy's girlfriend testified that she last saw Foy alive at 11:20 p.m. on May 3, 2004, when he left to go smoke marijuana with Paschal. The evidence revealed that defendant and Foy had a friendship, which soured before Foy's murder. Defendant believed that Foy stole from him and had orchestrated a robbery at defendant's house. This evidence shows that defendant had a motive to have Foy killed and that he intended that particular result. The evidence illustrated that defendant planned the murder, aided and encouraged it, and had time to take a second look at his decision to have Foy killed. *Plummer, supra* at 300; *Moore, supra* at 67. The evidence of motive, together with the evidence that defendant planned to have Foy killed, paid Paschal to kill Foy, and provided Paschal with a gun to do so, constitutes sufficient evidence to support a conclusion that defendant aided and abetted first-degree premeditated murder.

Defendant also argues that he was denied the effective assistance of counsel. Because there was no hearing pursuant to *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Defendant states that his trial counsel was ineffective for failing to request suppression of his statements on the grounds that his arrest was illegal. Defendant contends that, because the arresting officers were executing a search warrant at his home, and not an arrest warrant, that the trial court should have suppressed his post-arrest statements as the fruit of an unlawful arrest.

An arrest warrant is not generally required to accomplish a felony arrest, "so long as there is probable cause to believe that [the] defendant committed a felony." *People v Johnson*, 431 Mich 683, 690-691; 431 NW2d 825 (1988). The record demonstrates, and defendant concedes, that the police properly entered defendant's home pursuant to a search warrant in order to search for the gun used to kill Foy. At the *Walker* hearing, Sergeant Wilson testified that police arrested defendant during the execution of the search warrant, "based on the probable cause of the investigation of the homicide that Mr. Paris Lindsay was now one of the main suspects and based on our investigation we believed we had probable cause to make an arrest at that time." The testimony also revealed that, in his statement to police, codefendant Paschal implicated defendant in Foy's murder. The police both obtained the search warrant and arrested defendant on the basis of that information.

A finding of probable cause is supported by a determination that the facts available to an officer at the time of arrest would justify finding that a fair-minded person of average intelligence believed that the suspected person had committed a felony. *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998). The record in this case supports a conclusion that police had probable cause to arrest defendant independent of the search warrant. And, because the police had probable cause to arrest defendant when they entered his house, defendant's subsequent statements were not the fruits of an illegal arrest. *People v Dowdy*, 211 Mich App 562, 569-570; 536 NW2d 794 (1995); *Snider, supra*, at 415-416. For this reason, defense counsel was not ineffective when he failed to argue these grounds for suppression. Defense counsel is not required to advocate a meritless position. *Snider, supra* at 425.

Finally, defendant argues that the prosecutor committed misconduct that denied him a fair trial. Defendant asserts that the prosecutor injected highly prejudicial innuendo into the proceedings when he characterized defendant as a manipulator during his rebuttal argument.

Specifically, defendant claims that the prosecutor improperly convinced the jury that defendant faked his sickle cell anemia and that the prosecutor's statements portrayed him as an undesirable person who "must be guilty of something."

We review unpreserved claims of prosecutorial misconduct for plain error. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). Prosecutorial misconduct is decided on a case by case basis, and this Court must consider the relevant part of the record and examine the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The propriety of a prosecutor's remarks depends on all of the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id*. "'[P]rosecutors are accorded great latitude regarding their arguments and conduct.'" *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citation omitted). A prosecutor may argue from the evidence that a witness is not worthy of belief, *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996), and he does not need to confine his argument to the blandest of all possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001).

Prosecutors are "'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.'" *Bahoda, supra* at 282 (citation omitted). Additionally, a party has the right to fairly respond to issues raised by the other party. *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003). Further, in *People v Fields*, 450 Mich 94, 116; 538 NW2d 356 (1995), this Court stated, "the nature and type of comment allowed is dictated by the defense asserted, and the defendant's decision regarding whether to testify. When a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant's theory or evidence."

At trial, the defense theory was that defendant's medical condition and medication combined to prevent him from executing a voluntary waiver of his *Miranda* rights. And as a result, defendant's statements were not worthy of belief and could not support the conviction. During his closing statement, defense counsel argued that the testimony of defendant and his physician supported the defense theory. Defense counsel also argued that some of the prosecution witnesses fabricated their testimony and that other prosecution witnesses did not actually advance the prosecution's theory of the case. The prosecutor's comments that defendant used his medical condition to manipulate his doctor and the jury, were based on defendant's repeated emphasis that he suffered from sickle cell anemia, and were a proper response to defendant's theory of the case. *Jones, supra* at 353; *Fields, supra* at 116; *Bahoda, supra* at 282. There was no plain error. *McLaughlin, supra.*

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio